IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT DAVID HUFFMAN, Appellant.	No. 33585-9-II UNPUBLISHED OPINION

Hunt, J. — Robert David Huffman appeals his jury conviction for delivery of a controlled substance. He argues that (1) insufficient evidence supported the element of "delivery," and (2) the trial court erred in denying his motion to suppress evidence seized during an unlawful search. Holding that the evidence of delivery was insufficient, we reverse Huffman's conviction and remand for trial on possession of a controlled substance.

FACTS

I. Heroin Possession

Robert Huffman, a heroin addict, went with his girlfriend, Carol Needham, to his drug dealer's home, where he purchased $1000 worth of heroin. Huffman then drove Needham and

another woman, Brenda Lanning, to a remote spot where they used heroin. According to Huffman, Needham had previously purchased heroin for her personal use.

Gary Maxfield, a Jefferson County Corrections Officer, was supervising a jail work crew in that remote spot, looking for illegally dumped garbage. When Maxfield noticed Huffman's parked van, he suspected illegal dumping and approached Needham in the passenger seat. Maxfield saw Huffman in the driver's seat, slouched over and lethargic; Huffman's speech was slurred and almost unintelligible. Huffman tried to cover up a green satchel, in which Maxfield could see hypodermic needles and what appeared to be white pills.[1]

Maxfield asked the car's occupants for identification, which only one person, Lanning, produced. Maxfield called in Lanning's name on his police radio, requested a backup officer to respond to possible illegal dumping and drug use, and returned to the van. A few minutes later, Deputies Don Johnson and Brian Post arrived to investigate.

Johnson looked around the van but saw no evidence of illegal dumping.[2] Huffman explained to Johnson that the syringes were for Lanning, who was diabetic. When Johnson asked Huffman if he could see the syringes, Huffman said, "Sure," and showed him the unused syringes.

Post then asked Huffman to step out of the van. When Huffman complied, Post noticed a wooden axe handle inside the van. Post patted Huffman down for officer safety, removed a knife

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[1] These apparent "white pills" later turned out to be white cotton balls.

[2] We note that, after the suppression hearing, the trial court entered an unchallenged finding of fact that the van was "backed up against a pile of garbage." Clerk's Papers (CP) at 31. "Unchallenged findings of fact entered following a suppression hearing are verities on appeal." *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005).

from Huffman's pants, and asked Huffman's permission to look in the green bag. Huffman said, "Sure, go ahead." Inside the green bag, Post found heroin and other paraphernalia. Post placed Huffman under arrest, searched him incident to arrest, and found more heroin and approximately $700 in Huffman's pocket. Johnson then read Huffman his *Miranda*[3] rights.

II. Procedure

The State charged Huffman with delivery of a controlled substance, heroin. The State did not place Needham's name on its witness list. On the first day of trial, the State asked the court to issue a material witness warrant for her. The trial court refused because the State had neither tried to serve Needham nor shown that her testimony was material.

Huffman moved to suppress all evidence seized during his detention and arrest, arguing that the search was illegal under *Terry v. Ohio*.[4] Following a CrR 3.6 hearing, the trial court denied his motion, ruling that (1) Maxfield had authority to detain Huffman, (2) Post had an articulable suspicion that the van contained a weapon, and (3) Huffman consented to the search.

At trial, the State presented evidence of various quantities of heroin from Huffman's van: (1) solid heroin in the green satchel, (2) solid heroin in Huffman's pockets, (3) a syringe of liquid heroin on Needham's passenger seat, and (4) solid heroin inside Lanning's purse. Huffman testified that he had purchased the heroin for his personal use but that he did not deliver any to Needham or the other passengers. The State produced no direct evidence that Huffman had delivered heroin to anyone.

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[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct 1602, 16 L. Ed. 2d 694 (1966).

[4] 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The trial court instructed the jury that (1) "[d]eliver means the actual transfer of a controlled substance from one person to another," but "[a] purchaser of a controlled substance does not 'deliver' within the meaning above." Clerk's Papers (CP) at 57; and (2) it could find Huffman guilty of the lesser included offense of possession of a controlled substance if it did not find Huffman guilty of delivery.

The State argued in closing that (1) the jury should infer Huffman delivered heroin to Needham because Huffman possessed a large quantity of solid heroin, $720 in cash, plastic baggies, and paraphernalia; and (2) this circumstantial evidence showed that Huffman sold solid heroin to Needham, who had converted it into the liquid heroin found under her seat.

The jury convicted Huffman of delivery of a controlled substance. The jury did not complete the verdict form for the lesser included offense of simple possession, which the trial court had instructed them to address only if they did not find Huffman guilty of delivery.

Huffman appeals.

ANALYSIS

I. Insufficient Evidence of Delivery

Huffman argues that the evidence was insufficient to support his conviction because the State presented no evidence that he relinquished control of his heroin and, thus, presented no evidence of delivery.[5] We agree.

[5] Huffman acknowledges that the evidence presented might support a conviction for possession with the intent to deliver, but the State did not charge him with that crime. Nor was the jury instructed on possession with intent to deliver as a lesser included offense.

A. Standard of Review

Sufficiency of the evidence is a question of constitutional magnitude, which a defendant can raise for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995).

We review the sufficiency of the evidence to determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Applying these standards to the evidence here, we find the evidence of delivery insufficient.

B. "Delivery"

RCW 69.50.401 provides: "[I]t is unlawful for any person to . . . deliver, or possess with intent to manufacture or deliver, a controlled substance," including heroin. RCW 69.50.101(f) defines "deliver" as "the actual or constructive[6] *transfer* from one person to another of a substance, whether or not there is an agency relationship." (Emphasis added). Because the statute does not define "transfer," courts look to its common dictionary meaning. *State v.*

[6] "Constructive delivery" is the transfer of a controlled substance belonging to the defendant, or under the defendant's control, by some other person or manner at the instance and direction of the defendant. *State v. Martinez*, 123 Wn. App. 841, 847 n.8, 99 P.3d 418 (2004). The State neither alleged nor attempted to prove constructive delivery here.

Martinez, 123 Wn. App. 841, 846, 99 P.3d 418 (2004). Citing the dictionary, courts have interpreted "transfer" to mean "'to cause to pass from one person or thing to another,' as well as 'to carry or take from one person or place to another.'" *Martinez*, 123 Wn. App. at 846-47 (quoting Webster's Third New Int'l Dictionary 2426-27 (1971)).

But "a person who buys drugs does not 'transfer', and hence does not 'deliver'," because to "deliver" drugs, a person must undertake the active task of relinquishing control to another. *State v. Morris*, 77 Wn. App. 948, 951, 896 P.2d 81 (1995). We have previously found insufficient evidence to support a delivery conviction when (1) the defendant handed drugs to a girl, (2) the girl immediately shoved the drugs away, and (3) the drugs never left the defendant's hand. *Martinez*, 123 Wn. App. at 847. In contrast, in every published case in which we have found sufficient evidence of delivery, the State had presented testimonial evidence that the defendant sold drugs to another person.[7] But such is not the case here.

The State presented no direct evidence, and only minimal circumstantial evidence, at best, that Huffman transferred heroin to another person. The State asks us to infer that Huffman prepared heroin and transferred it to Needham from the following facts: (1) Huffman possessed a large amount of solid heroin, cash, and paraphernalia; (2) he prepared heroin for his own use before the deputies arrived; (3) Needham possessed a syringe that contained liquid heroin; and (4) Needham did not possess any solid heroin.

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[7] *See, e.g.*, *State v. Rangel-Reyes*, 119 Wn. App. 494, 499-500, 81 P.3d 157 (2003) (informant participated in drug deal with defendant); *State v. Wren*, 115 Wn. App. 922, 926, 65 P.3d 335 (officers saw drug deal by defendant), *review denied*, 150 Wn.2d 1006 (2003); *State v. Jones*, 93 Wn. App. 166, 170-77, 968 P.2d 888 (1998) (officers saw and heard drug deal by defendant), *review denied*, 138 Wn.2d 1003 (1999); *and State v. Hernandez*, 85 Wn. App. 672, 674, 935 P.2d 623 (1997) (officers saw, through high-powered binoculars, drug deal by defendant).

We hold that, even taking the evidence in the light most favorable to the State, the evidence was insufficient to support any rational trier-of-fact's finding guilt of delivery beyond a reasonable doubt. The State's proposed inferences are mere speculation. Although Needham might have been able to testify that Huffman had delivered the heroin she possessed, the State did not call her as a witness. Nor did the State call as witnesses the other passenger in the car to testify about Huffman's alleged delivery activities. Instead, the record contains only Huffman's uncontroverted testimony that (1) Needham prepared the syringe herself, using her own heroin that she had purchased herself; and (2) he never transferred his heroin to another person. But the jury, apparently, did not believe Huffman on this point.

In addition, on cross-examination, Deputy Post testified:

> Q: And, you weren't with these occupants of the car when they got the[re], were you?
> A: No, I was not.
> Q: You don't know how they obtained their heroin, do you?
> A: No, I do not.
> Q: You don't know who was present when that heroin was obtained?
> A: No, I do not.
> Q: You don't have any direct evidence of whether it was sold to either of the - that Mr. Huffman sold it to either of the occupants of the car, is that correct?
> A: That's correct.
> Q: Okay. And, you don't know when, if there was a sale, when that sale occurred, do you?
> A: I do not.

Report of Proceedings at 160 (spelling of "heroin" corrected throughout).

The State presented no testimony or documentary evidence to support its theory that Huffman sold or gave heroin to Needham or any other person. The State tried, but failed, to impeach Huffman's testimony that he never sold or gave heroin to another person. And even if a

rational jury disbelieved Huffman, as was its privilege, a rational jury could not find guilt beyond a reasonable doubt, where there was no evidence to support the State's allegation that Huffman had transferred heroin to Needham.

Accordingly, we reverse Huffman's conviction for delivery of heroin and remand for further proceedings.[8]

II. CrR 3.6 Ruling

Because the suppression issue will likely arise on remand, we next address whether the trial court erred when it denied Huffman's motion to suppress evidence under CrR 3.6. Huffman argues that (1) Maxfield's investigative stop for illegal dumping and the subsequent search of the van were unlawful, and (2) the trial court should have suppressed the evidence recovered from the van. We disagree.

A *Terry* stop is valid where (1) the initial stop is legitimate, (2) there exists a reasonable safety concern to justify a protective frisk for weapons, and (3) the scope of the frisk is limited to the protective purpose. *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). "A reasonable safety concern exists, and a protective frisk for weapons is justified, when an officer can point to 'specific and articulable facts' which create an objectively reasonable belief that a suspect is 'armed and presently dangerous.'" *Collins*, 121 Wn.2d at 173 (quoting *Terry v. Ohio*, 392 U.S. 1, 21-24, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). "[A] valid *Terry* stop may include a search of the interior of the suspect's vehicle when the search is necessary to officer safety."

[8] At oral argument, both parties acknowledged that the evidence was sufficient to submit a charge of simple possession to the jury. Here, although the jury had such charge before them as a lesser included offense, they did not fill out the applicable verdict form because they had been instructed to address the lesser included offense only if it did not convict Huffman of delivery of heroin.

State v. Larson, 88 Wn. App. 849, 853, 946 P.2d 1212 (1997).

Here, Maxfield's initial investigatory detention of Huffman's van and its occupants was legitimate. Maxfield suspected that the van was involved in illegal dumping because the area was known for illegal dumping and the van was "backed up against a pile of garbage." CP at 31; *see* n.2 supra. When Maxfield contacted the van's occupants, he observed that Huffman, the driver, was lethargic and slumped over. In plain view inside the van, Maxfield also noticed what appeared to be pills and drug paraphernalia. These facts could lead a reasonable person to believe that illegal dumping had occurred, that the occupants were using illegal substances, and that the driver was under the influence of illegal substances.

When Deputies Post and Johnson arrived, "Huffman made a furtive gesture and Deputy Post asked him to step out of the van. As he did so Deputy Post noticed an ax handle next to the driver's side door and he threw this weapon away from the vehicle."[9] CP at 32. These facts support Post's reasonable belief that Huffman was armed. *Collins*, 121 Wn.2d at 173. When Post patted down Huffman for officer safety, he recovered a knife from Huffman's pants. Having already discovered two weapons, and knowing that two people remained inside the van, Post properly searched the green satchel inside the van to ensure officer safety.[10] *See State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445 (1986); *see also*, *State v. Swaite*, 33 Wn. App. 477, 481, 656 P.2d 520 (1982). Therefore, Post's discovery of heroin and other paraphernalia inside the green

[9] Unchallenged finding of fact number 8.

[10] We note that Post obtained Huffman's consent before searching the satchel and discovering the heroin. Even absent such consent, under these facts, Post lawfully searched the interior of the van to ensure officer safety. *Larson*, 88 Wn. App at 853.

satchel was lawful.

Accordingly, we hold that the trial court properly denied Huffman's motion to suppress the evidence.

Reversed and remanded.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Armstrong, J.

Van Deren, A.C.J.